Supreme Court, U. S.
FILED
SEP 22 1976
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Supreme Court of the United States

October Term, 1976

No. 76-266

ORWIN B. GRIFFIN, JR.,

Petitioner,

vs.

RICHARD V. ZURZ, Individually and as Judge of the Court of Common Pleas for Summit County, Ohio; WILLIAM B. PIKE, Individually and as Referee of the Court of Common Pleas for Summit County, Ohio; and HOWARD L. CALHOUN, Individually and as an Officer of the Court of Common Pleas for Summit County, Ohio,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT, HOWARD L. CALHOUN, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Supreme Court of the United States

October Term, 1976
No. 76-266

ORWIN B. GRIFFIN, JR.,
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vs.

RICHARD V. ZURZ, Individually and as Judge of the Court of Common Pleas for Summit County, Ohio; WILLIAM B. PIKE, Individually and as Referee of the Court of Common Pleas for Summit County, Ohio; and HOWARD L. CALHOUN, Individually and as an Officer of the Court of Common Pleas for Summit County, Ohio,
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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT, HOWARD L. CALHOUN, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Howard L. Calhoun, Respondent, opposes the Petition For Writ Of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINION AND ORDERS IN COURTS BELOW

The United States District Court for the Northern District of Ohio, Eastern Division, issued its order sustaining Respondents' motion to dismiss treating the same as summary judgment on July 2, 1975 (Attached to the Petition as Appendix A) (A-1).

Upon appeal by Petitioner, the United States Court of Appeals for the Sixth Circuit issued its order affirming the judgment of the District Court on April 15, 1976 (Attached to the Petition as Appendix C) (A-8) and its order denying Petition for rehearing May 27, 1976 (Attached to the Petition as Appendix D) (A-9).

QUESTIONS PRESENTED

We do not believe that the four questions presented stated in the Petition for Writ of Certiorari are in fact questions presented by the same. Respondent Calhoun says that the questions presented are as follows:

1. Was any federal question presented by the Complaint to sustain jurisdiction of the United States District Court for the Northern District of Ohio, Eastern Division?

2. Was there a valid trial of all issues within the jurisdiction of the State Court of Common Pleas of Summit County, Ohio?

STATUTE INVOLVED

42 U.S.C. Sec. 1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Nature of the Case

Petitioner filed his Complaint in the United States District Court, Northern District of Ohio, Eastern Division, against Respondent Calhoun, an Attorney, and Respondents Zurz, a Judge of the Court of Common Pleas of Summit County, and Pike, a Referee of that Court. The Complaint alleged that on April 30, 1970 a divorce action was instituted against Plaintiff in the Court of Common Pleas of Summit County, Ohio and it proceeded to trial before Judge Koledin on February 3, 1971. It was further alleged that after five days of trial, Judge Koledin refused to continue and issued an order that he was ill and unable to continue. It was further alleged that on November 9, 1971 by order Judge Koledin set the case for hearing before Judge Swaim. It was alleged that Judge Swaim was not a Judge.

On August 4, 1971 before the final judgment, Judge Swaim entered an order finding Petitioner in contempt and committing him to the Summit County Jail for ten days, the entry being approved also by Respondent Pike as Referee. Petitioner claims that the recitals in that entry, that Petitioner appeared and the matter was referred to a Referee, were false. Complaint is made of another judgment on January 28, 1975 in the State Court entered by Judge Zurz finding Petitioner obligated to pay his former wife $7,966.00 and entered judgment. It also found that the previous jail sentence had not been served. It was alleged by Petitioner that he was not served with a copy of this entry until March 14, 1975 and that it was void.

Complaint was made that all Respondents acted under color of state law as to these matters and with malice towards him praying that the District Court declare that

the January 28, 1975 judgment was void, for an injunction precluding enforcement of the injunction and enjoining Respondents from harassing Petitioner and for One Million Dollars in damages as to each Defendant.

It was claimed that Respondent Calhoun prepared the various entries and submitted them for approval and filing knowing that they were false apparently because of Petitioner's claim that the Court was without jurisdiction.

Evidence with reference to these State Court proceedings was brought to the attention of the District Court and it treated Respondents' motion to dismiss therefore as a motion for summary judgment and sustained the same. The United States Court of Appeals for the Sixth Circuit affirmed the judgment of dismissal of the District Court and denied Petition for rehearing.

STATEMENT OF RELEVANT EVIDENCE

Petitioner's entire claim is centered upon the fact that Judge Koledin tried the divorce case for five days and then discontinued it, that thereafter Judge Swaim was without jurisdiction to hear the case and could not continue a trial commenced by Judge Koledin, so that Respondent Calhoun's conduct in submitting entries and the judgment of Respondent Judge Zurz participated in by Referee Pike were false and void respectively. It was shown, however, that although Petitioner objected to Judge Swaim hearing the case, he did in fact stipulate that the evidence before Judge Koledin should be transcribed and submitted to Judge Swaim without reproducing such evidence (Petition, page 11).

Petitioner as Defendant in the State Court divorce proceeding appealed to the Ohio Court of Appeals for the

Ninth District asserting as error the claims with regard to Judge Swaim and Judge Koledin asserted in the Complaint in the District Court herein. The Court of Appeals affirmed the judgment of the Court of Common Pleas holding in effect that the new trial ordered by Judge Koledin was not in fact a new trial in the classical sense, since no judgment had been rendered but that it was akin to declaring a mistrial and ordering the trial to recommence before Judge Swaim. The Court of Appeals did not say that the order in question was void as stated at page 10 of Petitioner's Brief. The Court of Appeals held that there was no error prejudicial to Petitioner's rights and affirmed the judgment of the Common Pleas Court (Appendix A) (A-1). The same questions were brought to the Supreme Court of Ohio which denied Petitioner's motion to certify (Appendix B) (A-3).

Petitioner's Petition for Writ of Certiorari to this Court on the same questions was denied (Appendix C) (A-4).

REASONS FOR DENYING THE WRIT

I. The District Court Properly Granted Summary Judgment for Defendants, Which Judgment Was Properly Sustained by the Circuit Court of Appeals There Being No Federal Question to Sustain Jurisdiction of the United States District Court.

Petitioner's Brief specifically relates to his claim against Respondent Calhoun on pages 7 and 8 only. It must be noted that there are no citations of authorities in this part of the Brief, only innuendo and allegation. Basically, the charges against Calhoun, in Petitioner's Brief, are that as attorney for Mrs. Griffin, he prepared and submitted to Judge Swaim an entry in the summer of 1971,

knowing that it contained false statements relating to a Court session and that he prepared and submitted a Judgment of January 28, 1975 to Judge Zurz likewise knowing that Judge Zurz had no jurisdiction. Plaintiff claims a violation under 42 U.S.C. Section 1983 of the Civil Rights Act and of the Fifth and Fourteenth Amendments of the Constitution.

As will be mentioned hereafter, there is no doubt that the Court of Common Pleas of Summit County, Ohio had jurisdiction of the subject matter and over the person of the Petitioner as Defendant, Orwin B. Griffin, Jr., in that action both as to the Judgments of August 4, 1971 and January 28, 1975 and also the divorce Judgment entered by Judge Swaim as to which apparently Plaintiff feels aggrieved.

It has been held that, "Lawyers who participate in the trial of private state Court litigation are not state functionaries acting under color of state law." *Skolnick v. Martin,* 317 F.2d 855 (7th Cir. 1963). Further, it has been held, "in private litigation, the state merely furnishes the forum and has no interest one way or the other in the outcome". *Bottone v. Lindsley,* 170 F.2d 705 (10th Cir. 1948). Also, it has been held that although a private attorney is an officer of the Court, he is not an official of any state. *Steward v. Meeker,* 459 F.2d 669 (3d Cir. 1972).

To the same effect, please see also *Brown v. Dunne,* 409 F.2d 341 (7th Cir. 1969).

And in a factually similar situation it was held that a valid claim was not stated against an attorney acting in civil litigation. *Hill v. McClellan,* 490 F.2d 859 (5th Cir. 1974).

It has also been suggested in a similar claim that an attorney while acting in litigation is subject to the

same immunity as a Judge while acting within his jurisdiction. *Guerdy v. Ford,* 431 F.2d 660 (5th Cir. 1970).

The only way that Petitioner claims that the Federal Court has jurisdiction over Defendant Calhoun is that "his action was under color of state statute, custom, or usage as referred to in Sec. 1983 of the Civil Rights Act."

This question has been met by most Circuit Courts of Appeals and in *Szijarto v. Legeman,* 466 F.2d 864 (9th Cir. 1972) the Court held:

> "Plaintiff's claim was one for damages, and purportedly rested upon Civil Rights Act (42 U.S.C. Sec. 1983) . . . But this circuit, in common with others, has held that such a claim is not within the purview of the Civil Rights Act, the reason being that an attorney, whether retained or appointed, does not act 'under color of' state law. Hence, the claim is not one coming within the jurisdiction of the District Court."

A comparable quote is found in the Fifth Circuit in *Nelson v. Stratton,* 469 F.2d 1155 (5th Cir. 1972). For additional cases, see:

Shelton v. Randolph, 373 F. Supp. 448 (District Court of W.D. Va. 1974).

U. S. ex rel. Gittlemacker v. Commonwealth of Pa., 281 F. Supp. 175 (District Court E.D. Pa. 1968).

The claims as to the Respondent Calhoun were properly before the Court of Common Pleas of Summit County, Ohio and the case was appealed to the Ohio Court of Appeals and appeals were attempted to the Supreme Court of Ohio and the Supreme Court of the United States. The issues being properly before the Ohio Courts and subject to a review therein, Petitioner as Plaintiff cannot now attempt to switch to a Federal Court and again review the

State Court proceedings. In a similar case before the United States District Court, Northern District of Ohio, Civil Action #C74-106 it was Judge Thomas' opinion that Section 1983 should not be a device by which the federal courts are resorted to for appeals from state court litigation. Comity between the Federal and State Courts would be violated by such a result. See also *Younger v. Harris*, 401 U.S. 37, 27 L. Ed. 2d 669, 91 S. Ct. 746 (1971). Federal Courts should not go behind what the State Courts have already considered as there has been a complete and thorough adjudication of these issues in the State Courts.

In similar situations, it has been held that a Federal Court will not exercise jurisdiction to in effect review a Judgment of a State Court. *Daniels v. Thomas*, 225 F.2d 795 (10th Cir. 1955), *Travelers Insurance Co. v. Davis*, 490 F.2d 536 (3d Cir. 1974).

II. Following the Trial Court's Decision, Petitioner Has Had This Same Matter Reviewed 5 Times by Other Courts. This Makes the 6th Review of the Same Litigation, All Previous Reviews Have Been Resolved in Favor of the Respondents' Position.

It is important to understand the history of this particular litigation and the extent to which Petitioner has had these issues considered and reviewed by the Courts (including this Court on one previous occasion).

Following the original trial Court's opinion, Petitioner went to the Court of Appeals for the Ninth District of Ohio, which issued its opinion affirming the lower Court's judgment, and entered its judgment affirming the Court of Common Pleas of Summit County, Ohio (Appendix A). Petitioner Griffin appealed to the Supreme Court of Ohio which dismissed the appeal as having no substantial constitutional question (Appendix B attached hereto). Certiorari was denied by this Court on October 15, 1974 (Appendix C attached hereto).

Following the dismissal by this Court of the Petition For Certiorari, Petitioner commenced an action in the District Court of the Northern District of Ohio, Eastern Division. That action raised the same questions which had been previously litigated in the Ohio Courts on 3 occasions and presents the same question by way of Certiorari to this Court. The District Court sustained the motions for summary judgment and that opinion is attached as Appendix A (A-1) to Petitioner's Brief. Thereafter, the Sixth Circuit Court of Appeals sustained the District Court and those entries are reflected as Appendices C (A-8) and D (A-9) to Petitioner's Brief.

All of the questions, arguments and citations in Petitioner's Brief have been exhaustively considered or reviewed by the Ohio Courts, as well as the Federal Courts on 5 previous occasions.

III. There Was Valid Trial of All Issues in the Court of Common Pleas of Summit County, Ohio.

There is no doubt that the Common Pleas Court of Summit County through Judge Swaim had jurisdiction of the subject matter and the parties in the divorce case involving Orwin B. Griffin, Jr. and Mildred Griffin.

The divorce case filed by Mildred Griffin was properly filed and there was no complaint by Petitioner in that case that the case was in the wrong jurisdiction. After Judge Koledin refused to continue hearing the case, Judge Swaim heard the case and Petitioner Griffin, as Defendant therein, stipulated that the previous five days of testimony heard by Judge Koledin could be considered by Judge Swaim, as shown on page 11 of Petitioner's Brief:

"and after Judge Swaim proposed to repeat the five days of testimony heard by Judge Koledin, Mr. Griffin agreed to the following:

'. . . a transcript of the previous trial shall be prepared and filed with the Clerk and that this Court will consider the same as evidence. . .'"

Obviously in the trial Court, Judge Swaim considered the five days of testimony given before Judge Koledin and the remaining testimony. It really doesn't make any difference what you call it, i.e. a new trial or a continuation of a previous trial, all of these issues have been thrashed out through the appeals to the Ohio Appellate Court, the subsequent appeal to the Ohio Supreme Court and the writ of certiorari to the United States Supreme Court which was denied. Therefore, this particular issue of jurisdiction has been dealt with throughout the Ohio Appeals Court and the Petitioner cannot now switch Courts to try to obtain relief through the Federal Courts system.

The Ohio Court of Appeals in its Opinion found that when Judge Koledin, after five days of trial, ordered a new trial before Judge Swaim, it was not a new trial in the classical sense since no judgment had been entered. It was, however, akin to declaring a mistrial and ordering the trial to recommence before Judge Swaim. Clearly, there was no error in these proceedings and the Ohio Court of Appeals so found. Much less could there be any claim that this should be the basis of an action in a United States Court.

As cited in Judge Contie's Opinion, the distinction between jurisdiction of the Court and jurisdiction of the Judge has been strongly made in Ohio. 14 O. JUR. 2d *Courts* § 3; *State ex rel. Hawke v. LeBlond*, 108 Ohio St. 126 (1923), 140 N.E. 510; *State of Ohio v. Lindsey*, 77 Ohio App. 191 (1945), 66 N.E.2d 256.

It is clear that jurisdiction of the divorce case was vested in the Court of Common Pleas and not in Judge Koledin so that Judge Swaim's conduct and entry of judgments were perfectly proper, and certainly within the jurisdiction of the Court.

The Complaint as to Respondent Calhoun preparing and submitting improper judgments again was completely subject to the review by the State Courts and the judgments entered within the jurisdiction of the Court. Not only does it appear that these judgments were not improper and did not contain false statements, but it appears entirely to the contrary, that they were accurate and entirely appropriate.

CONCLUSION

For the above reasons, it is respectfully submitted that the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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APPENDIX A

Judgment Entry of the Court of Appeals for the Ninth District of Ohio

(Filed November 26, 1973)

No. 7129

IN THE COURT OF APPEALS
SUMMIT COUNTY, OHIO

MILDRED K. GRIFFIN,
Appellee,

vs.

ORWIN B. GRIFFIN, JR.,
Appellant.

JUDGMENT AFFIRMED

This cause came on to be heard upon the notice of appeal on questions of law of the said Orwin B. Griffin, Jr., Appellant herein, together with a transcript of the docket and judgment entries of the Common Pleas Court of Summit County, Ohio, and such original papers, or transcripts thereof, as were necessary for said appeal, filed therewith in the said case, wherein Mildred K. Griffin was Plaintiff, and Orwin B. Griffin, Jr., was Defendant, mentioned and referred to in said notice of appeal, and was argued by counsel and submitted to the Court.

Upon consideration whereof, the Court finds that there is no error, prejudicial to Appellant, manifest upon the face of the record in said orders and judgment of

said Common Pleas Court of Summit County, Ohio, and, in its opinion, substantial justice has been done to the party complaining, as shown by the record of the proceedings, and the judgment under review.

It is thereupon considered, ordered and adjudged by this Court, that the judgment and proceedings of the said Common Pleas Court, in favor of the said Appellee and against the Appellant, be, and the same are hereby, in all things affirmed; there being, in the opinion of the Court, reasonable ground for this proceeding.

It is further considered and ordered, that the Appellant pay the costs of this proceeding, to be taxed, and, in default thereof, that execution issue therefor.

It is further ordered that a special mandate be sent to the Common Pleas Court of Summit County, Ohio to carry this judgment into execution.

George M. Jones (sgd)
Presiding Judge

Edwin J. Hofstetter (sgd)
Judge

Robert E. Cook (sgd)
Judge

(Judge George M. Jones, Judge Edwin J. Hofstetter, and Judge Robert E. Cook, of the Eleventh Appellate District, sitting by assignment in the Ninth Appellate District, under authority of Section 5(A)(3) of Article IV, Constitution of Ohio.)

APPENDIX B

Order of the Supreme Court of Ohio Dismissing Appeal

(Filed March 27, 1974)

No. 74-59

THE SUPREME COURT OF OHIO
THE STATE OF OHIO,
CITY OF COLUMBUS.

MILDRED K. GRIFFIN,
Appellee,

vs.

ORWIN B. GRIFFIN, JR.,
Appellant.

APPEAL FROM THE COURT OF APPEALS
FOR SUMMIT COUNTY

This cause, here on appeal as of right from the Court of Appeals for Summit County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

APPENDIX C

Order of the Supreme Court of the United States Denying Petition for Writ of Certiorari

(Dated November 1, 1974)

No. 73-1853

SUPREME COURT OF THE UNITED STATES

ORWIN B. GRIFFIN, JR.,
Petitioner,

v.

MILDRED K. GRIFFIN

ON PETITION FOR WRIT OF CERTIORARI to the Court of Appeals of the State of Ohio, Summit County,

ON CONSIDERATION of the petition for a writ of certiorari herein to the Court of Appeals of the State of Ohio, Summit County,

IT IS ORDERED by this Court that the said petition be, and the same is hereby, denied.

October 15, 1974